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No. 72-403

In the Supreme Court of the United States

OCTOBER TERM, 1973

ARTHUR F. SAMPSON, ADMINISTRATOR, GENERAL SERVICES ADMINISTRATION, ET AL., PETITIONERS

v.

JEANNE M. MURRAY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE PETITIONERS

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BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The initial (Pet. App. 1a-22a) and supplemental (Pet. App. 24a-33a) opinions of the court of appeals are reported at 462 F. 2d 871. The opinion of the district court (Pet. App. 39a-43a) is not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 23a) was entered on February 29, 1972, and a petition for rehearing with a suggestion for rehearing *en banc* was denied on April 27, 1972 (Pet. App.

34a-35a). On July 20, 1972, the Chief Justice extended the time for filing a petition for a writ of certiorari to September 9, 1972, and on September 8, 1972, the petition was filed. The petition was granted on March 19, 1973 (App. 45). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in a routine probationary employee discharge case, the district court may properly order an agency to retain the employee until after she exhausts her remedies with the Civil Service Commission.

STATUTE AND REGULATIONS INVOLVED

5 U.S.C. 5596(b) provides:

> An employee of an agency who, on the basis of an administrative determination or a timely appeal, is found by appropriate authority under applicable law or regulation to have undergone an unjustified or unwarranted personnel action that has resulted in the withdrawal or reduction of all or a part of the pay, allowances, or differentials of the employee—
>
> > (1) is entitled, on correction of the personnel action, to receive for the period for which the personnel action was in effect an amount equal to all or any part of the pay, allowances, or differentials, as applicable, that the employee normally would have earned during that period if the personnel

action had not occurred, less any amounts earned by him through other employment during that period; and

(2) for all purposes, is deemed to have performed service for the agency during that period, except that the employee may not be credited, under this section, leave in an amount that would cause the amount of leave to his credit to exceed the maximum amount of the leave authorized for the employee by law or regulation.

The provisions of 5 C.F.R. 315.801-315.807 are set forth at App. 9-12.

STATEMENT

Respondent Jeanne M. Murray was hired as a program analyst in January 1971 by the Public Buildings Service, General Services Administration, at an annual salary in excess of $18,000 (S. App.).[1] Under the applicable regulation of the Civil Service Commission (5 U.S.C. 315.801), respondent's career conditional appointment was subject to a one-year probationary period.

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[1] "S. App." refers to the sealed appendix on file with the Clerk of this Court containing respondent's personnel file. Pursuant to respondent's request, her personnel file was submitted to the district court and the court of appeals for *in camera* inspection only. We have agreed with respondent's counsel to follow the same procedure in this Court and thus have lodged the personnel file with the Clerk of this Court in a sealed envelope with the understanding that the file will not be available for public inspection.

On May 20, 1971, respondent was advised in writing by W. H. Sanders, the Acting Commissioner of the Public Buildings Service, that she was to be discharged from her position effective May 29 for her "complete unwillingness to follow office procedure and to accept direction from [her] supervisors" (App. 25-26).[2] The notice complied with the applicable Civil Service Commission regulations governing the discharge of federal probationary employees if her dismissal was based exclusively on conduct occurring during the probationary period. See 5 C.F.R. 315.804. If, however, her discharge was in fact based in whole or in part on conduct occurring prior to her appointment by the General Services Administration, she was entitled under 5 C.F.R. 315.805 to additional procedural rights. Those rights include advance notice of the proposed action against her, an opportunity to reply in writing and with supporting affidavits, and notice of an adverse agency decision on or before its effective date.

Following the receipt by respondent of Mr. Sanders' letter, respondent's counsel met with a GSA personnel officer to discuss respondent's termination (App. 7). Counsel were shown a memorandum (S. App.) from an officer of the Public Building Service upon which Mr. Sanders based his decision to terminate respondent's employment (App. 7). The two-page memorandum describes respondent's conduct as

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[2] Although a part of respondent's personnel file, Mr. Sanders' letter is part of the public record in this case and is thus included in the printed appendix.

a probationary employee and contains a recommendation that, "based on performance in her present position during her probationary period," she should be separated from the GSA (S. App.). The memorandum goes on to relate that an investigation had shown that respondent's conduct during her previous employment in the Defense Intelligence Agency had also been unsatisfactory; a one-page attachment to the memorandum summarized the comments of the persons consulted at that agency (S. App.).

Respondent thereupon filed an administrative appeal with the Civil Service Commission (see 5 C.F.R. 315.806(c)) alleging that her termination was based in part on conduct occurring prior to the probationary period and that she was thus entitled to the additional procedural rights set forth in 5 C.F.R. 315.805 (App. 19-24). Respondent's request that her appeal be considered on an expedited basis was denied (App. 8).

While her administrative appeal was pending, respondent instituted this suit in the district court seeking an injunction against her proposed discharge and a declaration that it was invalid (App. 2-5). Respondent alleged in her complaint that the result of the contemplated termination would be to deprive her indefinitely of her income, to permit "spurious and unrebutted" charges against her to remain on the record, and to subject her to the "embarrassment of being wrongfully discharged in the presence of her co-workers" (App. 4). Respondent claimed that, in the absence of injunctive relief, her employment would

be terminated during the pendency of her administrative appeal, thereby causing her irreparable injury (*ibid.*).

On May 28, 1971, one day before respondent's scheduled termination of employment, the district court issued a temporary restraining order barring respondent's discharge until her motion for a preliminary injunction could be heard (App. 33). At the hearing on the motion, the district court determined that a crucial issue to be resolved in the proceeding was whether Mr. Sanders had based his decision to discharge respondent solely on respondent's conduct during her period of probation (App. 37-38). Rejecting the government's offer to produce an affidavit from Mr. Sanders (App. 38-39), the court stated that it wanted him to appear personally before the court and testify so that the court could "make up [its] mind as to whether he is telling the truth" (App. 42). Accordingly, the earlier stay of respondent's discharge was continued pending the appearance of Mr. Sanders (App. 36).

The court subsequently issued an opinion concluding that it had jurisdiction to enjoin respondent's discharge, and that the granting of such relief would depend in part upon the court's determination "whether the government followed its own regulations" in discharging respondent (Pet. App. 43a). Pending review of the district court's action, the government has not produced Mr. Sanders to testify and the Commission has not processed respondent's appeal.

A divided court of appeals affirmed (Pet. App. 1a-22a). The court noted that the Civil Service Commission has no authority to stay a discharge pending administrative review, although it can award back-pay and order reinstatement (Pet. App. 3a, 10a). The court held, however, that the district court has general equity power to grant a preliminary injunction to prevent irreparable injury during administrative proceedings and that this power includes the power to conduct an evidentiary hearing on disputed factual matters (Pet. App. 8a-15a). The dissenting judge stated that the majority's "broad and novel" holding did violence to the statutory scheme governing the dismissal and reinstatement of federal employees (Pet. App. 19a).

In denying a petition for rehearing, the court issued a supplemental opinion stating that this case involves the "very limited principle * * * that in some very unusual circumstances a U. S. District Court may exercise its traditional equity powers to prevent irreparable injury" (Pet. App. 25a). The full court denied the government's suggestion for rehearing *en banc* by a vote of 6 to 3 (Pet. App. 35a).

SUMMARY OF ARGUMENT

1. Traditionally, the federal courts, in the absence of legislation, have had little or no role to play in the appointment or removal of federal employees. See *Matter of Hennen*, 13 Pet. 230; *Cafeteria & Restaurant Workers Union* v. *McElroy*, 367 U.S. 886, 896. Similarly, this Court has held that the federal courts

have no general equity jurisdiction to enjoin a federal employee discharge even though the discharge violates civil service regulations promulgated pursuant to statute. *White* v. *Berry*, 171 U.S. 366. The question in this case is thus not, as the court of appeals assumed, whether traditional equitable powers have been curtailed by Congress, but whether the courts should interfere with the comprehensive administrative procedures established to protect federal employees by fashioning novel equitable remedies which are inconsistent with that scheme.

2. Over the years, a comprehensive administrative procedure for the removal and reinstatement of federal employees has been developed by statute, executive order and regulation. Under current regulations, probationary employees may be terminated summarily; under sharply limited circumstances, they may appeal their terminations to the Civil Service Commission, but they are not entitled to evidentiary hearings before that agency. In the event their terminations are found to have been unwarranted and the employees are reinstated, they are entitled to backpay under 5 U.S.C. 5596.

3. The temporary enjoining by the district courts of probationary employee terminations is inconsistent with the administrative scheme governing employee discharges and would seriously disturb the balance achieved between the rights of federal employees and the interests of the government in maintaining an efficient civil service. Probationary employment by definition is a trial period during which summary ter-

mination is specifically authorized in the event the probationary employee proves to be unqualified. In enacting the Back Pay Act, Congress recognized the right of federal agencies summarily to discharge federal employees and provided backpay as the exclusive remedy for the loss of wages due to wrongful discharge.

The consideration of motions for interim relief by the district courts interferes unduly with the role and autonomy of the Civil Service Commission. With respect to probationary employees, the scope of the proceedings before the district courts on such motions will be far broader than the scope of the appeal proceedings before the Commission. Under such circumstances, the role of the Commission in resolving employee disputes could to a considerable extent be preempted by the district courts. Moreover, the ruling of the court below does not, as it stated, involve only a "limited principle," since many discharged federal employees can easily make allegations of irreparable injury similar to those respondent made.

4. This case does not involve the traditional equitable powers of appellate or reviewing courts to preserve their jurisdictions. See *Scripps-Howard Radio* v. *Federal Communications Commission*, 316 U.S. 4; *Federal Trade Commission* v. *Dean Foods Co.*, 384 U.S. 597. Both *Scripps-Howard* and *Dean Foods* construed the All Writs Act—authorizing federal courts to issue writs "in aid of their respective jurisdictions" (28 U.S.C. 1651 (a))—to permit courts of appeals to enjoin agency action either to prevent ir-

reparable injury pending completion of judicial review proceedings that had been initiated or to preserve the status quo so that later effective appellate review would be possible.

In this case, no judicial review proceedings were pending and the interim injunction sought by respondent was not necessary to preserve the district court's jurisdiction to review any eventual adverse decision by the Civil Service Commission on respondent's administrative appeal of her termination. The decision below is thus not supported by the All Writs Act. Finally, Section 10(d) of the Administrative Procedure Act, 5 U.S.C. 705—which for the most part codified existing law reflected by this Court's decision in *Scripps-Howard*, *supra*—does not authorize the enjoining of probationary employee discharges pending resolution of appeals to the Civil Service Commission.

ARGUMENT

THE DISTRICT COURTS MAY NOT ORDER FEDERAL AGENCIES TO RETAIN TERMINATED PROBATIONARY EMPLOYEES BEYOND THEIR TERMINATION DATES UNTIL THEY EXHAUST THEIR ADMINISTRATIVE REMEDIES WITH THE CIVIL SERVICE COMMISSION

A. Introduction

Under long-standing decisions of this Court, the federal courts, in the absence of legislation, have had little or no role to play in the appointment or removal of federal employees. See *Matter of Hennen*, 13 Pet. 230; *Keim* v. *United States*, 177 U.S. 290; *Eberlein*

v. *United States*, 257 U.S. 82; *Myers* v. *United States*, 272 U.S. 52; *Cafeteria & Restaurant Workers Union* v. *McElroy*, 367 U.S. 886, 896. In *Matter of Hennen*, *supra*, a federal district court clerk challenged his removal by the district judge; the district judge had acknowledged the clerk's competence and that the appointment of a replacement clerk was simply for personal reasons. This Court held that it had no power to review the grounds of removal of the clerk (13 Pet. at 261), since, unless otherwise specified by the Constitution or by statute, all federal officers are held "at the will and discretion of some department of the government," and subject to removal at pleasure (13 Pet. at 259).

Similarly, in *Keim* v. *United States*, 177 U.S. 290, the Court refrained from reviewing the grounds for discharging a federal employee, holding that such matters are "peculiarly within the province of those who are in charge of and superintending the departments, and until Congress by some special and direct legislation makes provision to the contrary, we are clear that they must be settled by those administrative officers" (177 U.S. at 296).

The government's right to remove federal employees may not, of course, be exercised in a discriminatory manner or as a means of curbing legitimate freedom of expression. See, *e.g.*, *Wieman* v. *Updegraff*, 344 U.S. 183, 191-192; *United Public Workers* v. *Mitchell*, 330 U.S. 75, 100. But within those limits, the Court has reaffirmed in recent years the "settled principle that government employment, in the

absence of legislation, can be revoked at the will of the appointing officer." *Cafeteria & Restaurant Workers Union* v. *McElroy*, *supra*, 367 U.S. at 896.[3]

As a corollary to the principle that government employment can be revoked at will in the absence of legislation, the Court ruled long ago in *White* v. *Berry*, 171 U.S. 366, that the federal courts have no general equity jurisdiction to enjoin the discharge of a federal employee, even when it is alleged that the discharge would violate civil service rules promulgated pursuant to a statute enacted by Congress. The Court held that, whatever remedies discharged employees might have at law, their discharges "cannot be restrained by a court of the United States, sitting in equity," since "[i]nterference by the judicial department in such cases would lead to the utmost confusion in the management of executive affairs" (171 U.S. at 378).

In short, the federal courts have only a limited role in federal employment matters and have no general or historic equity jurisdiction thereover. The court of appeals therefore incorrectly assumed that the question for resolution in this case was whether Congress, in enacting the Civil Service Act or the Back Pay Act, had eliminated the equity jurisdiction of the district courts so that they could not "continue to perform their historic role and grant equitable relief in the exceptional cases which may arise in this

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[3] For a full discussion of this point, see our brief on the merits in *Arnett* v. *Kennedy*, No. 72-1118, probable jurisdiction noted, April 2, 1973.

area" (Pet. App. 10a-11a, n. 21; see also Pet. App. 17a, 25a). In fact, the district courts have not historically or traditionally granted equitable relief in federal employment cases. The question is thus not whether Congress has taken away those equitable powers, but whether the courts should interfere with the comprehensive administrative scheme governing the removal and reinstatement of federal employees by fashioning equitable remedies which are inconsistent with that scheme. It is to the administrative scheme that we now turn.

B. There is a Comprehensive Administrative Scheme Governing the Removal and Reinstatement of Federal Employees

1. In 1883, Congress enacted the Civil Service Act establishing the United States Civil Service Commission. 22 Stat. 403. While the Act was primarily concerned with the screening of applicants for federal employment, it also contained a substantive provision freeing persons in the public service from "any obligations to contribute to any political fund, or to render any political service" and prohibiting their removal for refusing to do so. 22 Stat. 404. In the succeeding years, various rules were promulgated from time to time under the Act prohibiting the removal of employees from positions subject to competitive examination except for "just cause" (Civil Service Commission, *14th Annual Report*, p. 133 (1898)) or for "such cause as will promote the efficiency of the public service" (Civil Service Commission, *20th Annual Report*, p. 60 (1904)), but these non-statu-

tory rules could be and were weakened by amendment (see Civil Service Commission, *22d Annual Report*, pp. 62-63 (1905)).

To provide certain federal employees with more permanent protection against arbitrary discharges, Congress, in 1912, enacted the Lloyd-LaFollette Act, 37 Stat. 555 (now codified, as amended, at 5 U.S.C. 7501). That Act provided that no person in the "classified civil service" could be removed except for such cause as would "promote the efficiency of said service," and then only after he had been given notice of, and an opportunity to answer, the charges against him. 37 Stat. 555. In Section 14 of the Veterans' Preference Act of 1944, 58 Stat. 390-391 (now codified, as amended, at 5 U.S.C. 7701), Congress took another step in protecting federal employees by providing for a right of appeal to the Civil Service Commission by a discharged permanent civil service employee entitled to a veteran's preference. This right of appeal to the Commission was extended to most employees in the competitive civil service by Commission regulations (27 Fed. Reg. 4759; now 5 C.F.R. 752.101-752.402) adopted pursuant to Section 14 of Executive Order No. 10988, January 17, 1962, 27 Fed. Reg. 556.

Under current Commission regulations, a permanent civil service employee against whom adverse action is contemplated is entitled to 30 days' advance written notice stating in detail the reasons for the proposed action. After the employee has had an opportunity to reply, he is entitled to notice of an adverse decision with a statement of the grounds of

the decision on or before the effective date of the adverse action. 5 C.F.R. 752.202.[4] Following the adverse decision, the employee may appeal either directly to the Civil Service Commission (5 C.F.R. 752.203) or first appeal to his agency under its appeals system (5 C.F.R. 771.205), followed, if necessary, by an appeal to the Commission. In any appeal to the Commission, the permanent employee is entitled to a full evidentiary hearing and an initial decision by a regional office of the Commission. 5 C.F.R. 772.305, 772.306. A final appeal from the initial decision lies with the Commission's Board of Appeals and Review. 5 C.F.R. 772.307.

In contrast to the comprehensive administrative procedures available to permanent civil service employees to contest their discharges, probationary employees have limited protection from discharge. Under 5 C.F.R. 315.801, the first year of service of an employee who, like respondent (S. App.), is appointed from the Commission's register of qualified applicants to a career conditional position, is a probationary period. If the agency determines that the employee's conduct during the probationary period fails to show

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[4] The constitutionality of discharging a *permanent* federal employee following compliance with the notice and opportunity to reply requirements of 5 C.F.R. 752.202 but prior to subsequent review of the discharge in full trial-type hearings before the pertinent agency (5 C.F.R. 771.208-771.213) or the Civil Service Commission (5 C.F.R. 772.305) is at issue in *Arnett* v. *Kennedy*, No. 72-1118, probable jurisdiction noted, April 2, 1973. Respondent has not challenged in this case the constitutionality of the administrative procedures governing the termination of *probationary* employees.

that he is qualified for continued employment, it may at any time during that period terminate his employment simply by notifying him in writing of the reasons for and the effective date of the termination. 5 C.F.R. 315.804. In the event the termination is based on conduct occurring prior to the probationary period, however, the employee is entitled to advance notice of proposed termination, an opportunity to respond in writing and with supporting affidavits, and notice of any adverse decision on or prior to the effective date of the termination. 5 C.F.R. 315.805.

The probationary employee has only a limited right to appeal his termination. He has no right to an administrative appeal within his agency. See 5 C.F.R. 771.201(b)(4). He may appeal his discharge to the Civil Service Commission, but only on the grounds that his termination (1) was based on discrimination because of race, color, religion, sex, or national origin, (2) was based on political reasons or marital status or allegedly resulted from improper discrimination because of a physical handicap, or (3) was based on preemployment conduct and was not effected in accordance with the applicable procedures for such a termination. 5 C.F.R. 315.806. On such an appeal to the Commission, the probationary employee may submit evidence by affidavit (5 C.F.R. 772.304), but is not entitled to a hearing. See 5 C.F.R. 772.305(a). Finally, like permanent employees, the probationary employee may appeal an adverse initial decision on his appeal to the Commission's Board of Appeals and Review. 5 C.F.R. 772.307. In short, under the appli-

cable regulations, executive agencies may summarily dismiss probationary employees subject only to limited review by the Commission.

If either a permanent or probationary employee unsuccessfully exhausts his administrative remedies, he may obtain limited judicial review of the Commission's final decision in a district court on the basis of the administrative record. The precise scope of that review, however, is a subject of some disagreement among the circuits. See, *e.g.*, *Dozier* v. *United States*, No. 72-3305, C.A. 5, decided February 14, 1973, slip op. 4; *Norton* v. *Macy*, 417 F. 2d 1161, 1164 (C.A. D.C.); *Vigil* v. *Post Office Department*, 406 F.2d 921, 922 (C.A. 10); *Taylor* v. *Civil Service Commission*, 374 F.2d 466, 469-470 (C.A. 9); *Brown* v. *Zuckert*, 349 F.2d 461 (C.A. 7).

2. The administrative scheme described above provides a mechanism for discharged employees to contest their discharges by appeal, but permits the discharges to become effective pending review. In 1948, Congress amended the basic Lloyd-LaFollette Act of 1912 to provide that any person in the "classified civil service" who is discharged and later restored to his job on the ground that his discharge was unjustified is entitled to backpay for the period he was out of work. 62 Stat. 355. In enacting this backpay statute, Congress recognized the continuing authority of the executive to dismiss a federal employee, and merely provided a means for compensating the employee in the event his discharge was overturned on appeal. During the debates on the legislation, the

manager of the bill in the Senate, Senator Langer, commented that the bill (94 Cong. Rec. 6681):

> * * * provides that an agency or department of the Government *may remove any employee at any time*, but that the employee shall then have a right of appeal. When he is removed, he is of course off the payroll. If he wins the appeal, it is provided that he shall be paid for the time during which he was suspended. [Emphasis supplied.]

In 1966, Congress extended the backpay provisions (now codified in 5 U.S.C. 5596) to cover all wrongfully discharged federal employees, including probationary employees. 80 Stat. 94-95. The purpose of the extension, like the original 1948 provision, was to provide the means whereby all wrongfully discharged employees could be "made whole". S. Rep. No. 1062, 89th Cong., 2d Sess., p. 2; H. Rep. No. 32, 89th Cong., 1st Sess., p. 1.

C. The Action of the District Court in Enjoining Respondent's Discharge is Inconsistent with the Administrative Scheme Governing Federal Employee Discharges

This Court has stated that where Congress

> * * * has enacted a specific statutory scheme for obtaining review, * * * the doctrine of exhaustion of administrative remedies comes into play and requires that the statutory mode of review be adhered to notwithstanding the absence of an express statutory command of exclusiveness.

Whitney National Bank v. *Bank of New Orleans*, 379 U.S. 411, 422. See also *McKart* v. *United States*, 395

U.S. 185, 193-195; *Aircraft & Diesel Equipment Corp.* v. *Hirsch*, 331 U.S. 752, 767-768. The "[a]pplication of the doctrine to specific cases requires an understanding of its purposes and of the particular administrative scheme involved." *McKart*, *supra*, 395 U.S. at 193. A primary purpose of the doctrine, of course, is to avoid premature interruption of the administrative process; a closely related purpose is to preserve executive and administrative autonomy. *McKart*, *supra*, 395 U.S. at 193-194. Application of the doctrine also permits administrative agencies to correct errors which may have occurred in administrative proceedings without the need of judicial action.

The court of appeals ruled that the doctrine of exhaustion of administrative remedies has no relevance to this case since the Civil Service Commission has no authority to grant interim injunctive relief and since respondent thus had no administrative remedies to exhaust before applying to the district court for such relief (Pet. App. 6a-8a). The court also emphasized that, in ruling on respondent's request, the district court would not decide the merits of respondent's claim that her discharge was based on preemployment conduct, but only whether there is any likelihood of success on the merits; the role of the Commission in deciding the merits would not, in the court's view, be disturbed (Pet. App. 25a-26a).

We agree with the court of appeals that this case does not present an exhaustion question in the traditional context of deferring judicial consideration of a matter to be decided by an administrative agency.

But the policies underlying the exhaustion doctrine —respect for the administrative process and preservation of executive and administrative autonomy— are implicated here. As in traditional exhaustion cases, the fundamental questions at issue in this case are what is the established administrative scheme and is the relief sanctioned by the court of appeals inconsistent with the scheme. In our view, the enjoining of a probationary employee termination pending review of the termination by the Civil Service Commission is wholly inconsistent with the administrative scheme governing the removal and reinstatement of probationary employees—a scheme which retains the executive's authority summarily to dismiss such employees and provides for backpay as the sole remedy if a dismissal is overturned on review.[5]

As we have noted, this Court has recognized the "settled principle" that in the absence of legislation government employment may be revoked at will. *Cafeteria & Restaurant Workers Union* v. *McElroy*, *supra*, 367 U.S. at 896. By the legislation, executive action and rulemaking described above, this principle has been modified to protect federal employees in various ways from arbitrary adverse action. The protective scheme embodies a balancing of the rights of

[5] We contend here only that the district courts may not enjoin discharges of *federal* employees pending administrative review of their discharges. Whether a *private* employer may be enjoined under certain circumstances from discharging an employee pending the processing by an administrative agency of a complaint challenging the discharge is, of course, a different question.

employees against the legitimate interests of the executive in maintaining an effective civil service.

Thus, permanent employees may be discharged for cause after notice and an opportunity to reply, but before a full evidentiary hearing before the agency or the Civil Service Commission; probationary employees may be terminated summarily with only limited rights to appeal their terminations to the Commission. In neither case did Congress seek to limit further the traditional authority of the executive to discharge federal employees by authorizing the Commission or the courts to enjoin discharges pending completion of administrative review. In fact, Congress has imposed no restraints whatever on terminations of probationary employees other than to require backpay in the event of reinstatement; the limited procedural rights of probationary employees are conferred solely by regulation.

In enacting the Back Pay Act, Congress recognized that the government may remove any employee prior to completion of administrative review of the removal and chose not to limit that authority. Instead, the Act provides the exclusive mechanism for making any discharged employee "whole" in the event his discharge proves to be unwarranted (see pp. 17-18, *supra*). The Act thus complemented the preexisting administrative scheme by providing relief for wrongful discharge where previously no relief had been available.[6]

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[6] If Congress had felt that further relief should be afforded federal employees against summary discharges, it presum-

The decision of the court below seriously disturbs the balance achieved in the administrative scheme between the rights of the employees and the interests of the government. Under the court's decision, probationary employees who have been found to be incompetent, unwilling to accept supervision or otherwise disqualified for further service may, nevertheless, continue in employment with full pay pending review by the Civil Service Commission of their discharges. Such interference with the government's traditional right summarily to discharge probationary employees is inconsistent with the whole concept of a one-year probationary period—a trial period during which summary termination is specifically authorized in the event the employee proves to be unqualified.[7]

The court of appeals attempted to justify its decision on the ground that it was not interfering with the administrative scheme for reviewing discharge disputes, but was only sanctioning interim relief which the Civil Service Commission was powerless to

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ably would have given the Civil Service Commission the administrative authority to stay a discharge on a proper showing pending review of the discharge by the Commission. As the court below recognized, however, the Commission has no such authority (Pet. App. 6a, n. 12).

[7] Under 5 C.F.R. 315.803, an agency

> * * * shall utilize the probationary period as fully as possible to determine the fitness of the employee and shall terminate his services during this period if he fails to demonstrate fully his qualifications for continued employment.

grant (Pet. App. 6a-7a). Apart from the fact that Congress intended reinstatement and backpay to be the exclusive form of relief from wrongful discharges, this rationale seriously misjudges the impact of the decision on the administrative process.

As we have noted (pp. 16-17, *supra*), the grounds on which probationary employees may appeal their terminations to the Civil Service Commission are sharply limited. In the case of respondent's appeal, the sole issue will be whether her termination was based in whole or in part on preemployment conduct. Moreover, the review procedures before the Commission are summary in nature; respondent may make written submissions, but is not entitled to a hearing. 5 C.F.R. 772.304-772.305. The limited scope and summary nature of administrative review are consonant with the principle that federal agencies have broad discretion in summarily dismissing probationary employees. We are informed by the Civil Service Commission that in fiscal year 1972, some 2,950 probationary employees were released by the federal government. The figure for fiscal 1971 is 4,430.

Under the decision below, probationary employees may obtain review of their discharges in the district courts prior to any action by the Commission by alleging that they will be irreparably injured if discharged pending Commission review, and the district court may hold an evidentiary hearing to determine whether an injunction should issue. In this case, for example, the district court ordered the government to produce a witness to enable the court to resolve the

very issue that is the subject of the respondent's appeal to the Commission—*i.e.*, whether her discharge was based on conduct arising prior to her employment. The court of appeals approved the district court's order, noting that the preferred procedure in considering motions for preliminary injunctions is to take oral testimony on disputed matters of fact (Pet. App. 14a-15a).

Thus, under the theory of preventing irreparable injury or "breathing life into the regulations of the Government agencies" (Pet. App. 15a), the court of appeals has sanctioned preliminary court proceedings far broader in scope than the administrative proceedings sought to be protected. That the district court's decision is not a determination "of the merits" but only of whether there is any "likelihood of success on the merits" (Pet. App. 26a), does not negate the fact that the district court is inquiring into the very matter reserved under the administrative scheme for consideration by the Commission. While the Commission may not be bound by the district court's ruling on the likelihood of success, it can hardly fail to take notice of and be influenced by the district court proceedings. Thus, to a significant degree, the court of appeals has preempted the authority of the Civil Service Commission to resolve personnel disputes in the first instance. As the Third Circuit explained in *American Federation of Government Employees* v. *Resor*, 442 F.2d 993, 994, in refusing to enjoin the discharge of federal employees prior to the exhaustion of remedies before the Civil Service Commission:

> For the courts to act prematurely, prior to the final decision of the appropriate administrative agency, would raise a serious question regarding the doctrine of the separation of powers, and in any event would violate a congressional decision that the present controversy be initially considered by the Civil Service Commission.[8]

Consideration of the traditional role of the courts in federal personnel cases provides a further indication of the damaging effect of the decision below on the administrative process. Judicial review of Civil Service Commission decisions is limited and confined to the administrative record (see cases cited at p. 17, *supra*). The resolution by a district court of a motion for interim relief, on the other hand, may well involve a trial of disputed factual issues. Thus, under the decision below, not only are the courts interjected into personnel cases prematurely, they are interjected in a context that requires them to play a much greater role in the resolution of the factual issues underlying the cases than they would play in the exercise of their normal judicial review function.

The court of appeals' conclusion (Pet. App. 25a) that its decision involves only a limited principle and

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[8] *Schwartz* v. *Covington*, 341 F.2d 537 (C.A. 9), is the only employee discharge case which arguably supports the decision below. In *Schwartz*, a stay of plaintiff's discharge from the armed forces was granted pending review of the discharge by the Army Board for Correction of Military Records. As the dissenting judge below observed (Pet. App. 32a-33a), however, the majority's reliance on that decision is misplaced, since review by the Board has not been deemed a part of the administrative process. See *e.g.*, *Ogden* v. *Zuckert*, 298 F.2d 312 (C.A. D.C.).

will be invoked only in rare instances is dubious. Many, if not all, discharged federal employees could make allegations similar to respondent's of irreparable injury from loss of wages, the presence of charges on her record, and embarrassment. Such injuries would appear to be inevitable incidents of any discharge. Moreover, on the merits, respondent contests her discharge on a relatively routine procedural ground. In short, the decision below threatens to disrupt pervasively the summary procedures for discharging federal probationary employees found unfit for further service.

Nor is the impact of the decision below necessarily confined to the discharge of probationary employees. As we have noted, permanent civil service employees may be discharged for cause prior to administrative evidentiary hearings on their discharges. They too will be encouraged by the decision below to seek to enjoin their discharges pending completion of the hearings and the administrative review process on the ground that they will be irreparably injured by the loss of wages notwithstanding the awarding of backpay in the event their discharges are overturned. The effect of the court of appeals' ruling, if allowed to stand, will be to add a new and unwarranted tier of litigation in federal personnel cases.

D. This Case Does Not Involve The Traditional Power of the Courts to Grant Equitable Relief to Preserve Their Jurisdiction or Make Judicial Review Meaningful

In ruling that the temporary enjoining of federal employee discharges pending administrative review

was within the district courts' traditional equity powers, the court of appeals (Pet. App. 8a-10a) relied heavily on this Court's decisions in *Scripps-Howard Radio* v. *Federal Communications Commission*, 316 U.S. 4, and *Federal Trade Commission* v. *Dean Foods Co.*, 384 U.S. 597. Neither case supports the ruling below.

In *Scripps-Howard*, the Federal Communications Commission had granted a radio broadcast licensee a construction permit to change its broadcast frequency and increase its transmission power. Claiming that the changes would interfere with its operations and that the Commission could not lawfully grant the permit without a hearing, another licensee sought judicial review in the court of appeals and a stay of the Commission's action pending that review. On certificate from the court of appeals, this Court held that the court of appeals could stay the effectiveness of the Commission's order pending judicial review. The Court noted that federal courts traditionally could stay the enforcement of a judgment pending the outcome of an appeal and that this power was conferred by the All Writs Act.* 316 U.S. at 10, n. 4. The Court reviewed the Communications Act of 1934 and found no basis for concluding that Congress had intended to deprive the courts of appeals, in reviewing Federal Communication Commission

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* Now codified at 28 U.S.C. 1651(a), which provides: "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

orders, of their conventional power to stay the enforcement of orders pending completion of judicial review. 316 U.S. at 11-17.

In *Federal Trade Commission* v. *Dean Foods Co.*, 384 U.S. 597, the Court again relied on the All Writs Act in holding that a court of appeals had jurisdiction to issue a preliminary injunction to prevent consummation of a merger then under attack before the Federal Trade Commission as violative of Section 7 of the Clayton Act, 15 U.S.C. 18. The Court noted that the court of appeals has exclusive jurisdiction under Section 11(c) of the Clayton Act, 15 U.S.C. 21(c), to review final Commission orders and that this grant of jurisdiction includes the "traditional power to issue injunctions to preserve the *status quo* while administrative proceedings are in progress and prevent impairment of the effective exercise of appellate jurisdiction." 384 U.S. at 604.

In both *Scripps-Howard* and *Dean Foods*, the Court reaffirmed the courts of appeals' power under the All Writs Act to issue injunctions "in aid of their respective jurisdictions." 28 U.S.C. 1651(a). In *Scripps-Howard*, an appeal from a final order of the Federal Communications Commission was pending before the court of appeals and a stay of the order was necessary to prevent irreparable injury pending the resolution of the appeal; in *Dean Foods*, injunctive relief was necessary in order to permit effective administrative review of an imminent merger and allow for appellate review of the administrative agency's decision. In both cases, a stay by the court of

appeals was directly related to the immediate or potential exercise of the court's appellate jurisdiction and was appropriate to protect that jurisdiction.

In this case, however, the temporary enjoining of respondent's termination by the district court was not necessary to protect the potential exercise of the district court's jurisdiction to review the decision of the Civil Service Commission on respondent's appeal. The immediate discharge of respondent would in no way limit the court's authority fully to review her discharge after the Civil Service Commission decides her appeal, or prevent it from fully providing all the relief that Congress has authorized in this situation —reinstatement and backpay. The district court's order thus was not "in aid of [its] * * * jurisdiction" and was not authorized by the All Writs Act.

Finally, in *Scripps-Howard* and *Dean Foods*, the Court noted that in the relevant regulatory statutes Congress had been silent with respect to the power of the courts to grant interim equitable relief pending judicial review and that there was no reason to infer from that silence that Congress meant to cut back on the courts' traditional equity powers. Neither case involved any inconsistency between the administrative schemes established by Congress and the granting of equitable relief by the courts pending judicial review. In this case, by contrast, the administrative scheme (including the Back Pay Act) governing the removal and reinstatement of federal employees is wholly inconsistent with the enjoining of employee discharges pending administrative review. In enact-

ing the Back Pay Act, Congress provided the e exclu-
sive remedy for loss of pay due to wrongful dis scharge.

Although not discussed by the courts below, we also
point out that Section 10(d) of the Admini istrative
Procedure Act, 5 U.S.C. 705, does not confe r juris-
diction on the district courts to enjoin fede ral em-
ployee discharges pending administrative review.
Section 10(d) provides in relevant part that

> * * * to the extent necessary to prevent i irrepar-
> able injury, the reviewing court * * * ma ay issue
> all necessary and appropriate process to p postpone
> the effective date of an agency action or to pre-
> serve status or rights pending conclusion n of the
> review proceedings.

The legislative history of Section 10(d) in ndicates
that it was intended "to provide intermedia te judi-
cial relief * * * in order to make judicial review
effective" (S. Rep. No. 752, 79th Cong., 1st Sess., p.
27) and, with one exception not relevant he ere, re-
flected existing law under *Scripps-Howard* (id. at 44
(appendix to statement of Attorney General Tom C.
Clark)). Thus, since *Scripps-Howard* and its progeny
do not confer jurisdiction on the district court t in this
case, neither does Section 10(d) of the Adm inistra-
tive Procedure Act. Moreover, the Attorney G eneral's
Manual on the Administrative Procedure Act (1947)[10]
states (p. 106):

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[10] The Manual was compiled after the Act becam ne law to
guide federal agencies in adjusting their procedure es to the
requirements of the Act (Manual, p. 6).

> The "reviewing court" in which section 10(d) vests the power to stay agency action is the court, and only that court, which has obtained jurisdiction to review the final agency action * * *. Section 10(d) confers no power upon a court in advance of the submission to it of final agency action for review on the merits. See *Federal Power Commission* v. *Metropolitan Edison Co.*, 304 U.S. 375, 383 (1938).

In this case, the Civil Service Commission has not yet ruled on respondent's appeal and no final agency action is pending before any "reviewing court."

Finally, even if Section 10(d) conferred jurisdiction on the district court to consider respondent's claim for interim relief, her suit should have been dismissed since the temporary loss of pay, the presence of charges on her record, and embarrassment pending review by the Civil Service Commission of a federal employee's discharge is not—assuming backpay will be awarded and reinstatement ordered in the event the discharge is overturned—the type of "irreparable injury" contemplated by Section 10(d) as justifying interim equitable relief. See *Wettre* v. *Hague*, 74 F. Supp. 396, 400-401 (D. Mass.), vacated and remanded on other grounds, 168 F.2d 825 (C.A. 1). For a discussion of Section 10(d), see Jaffe, *Judicial Control of Administrative Action*, pp. 659-662, 667-672 (1965).

In short, the federal courts have never enjoyed traditional equitable powers to enjoin federal employee discharges (see *White* v. *Berry*, 171 U.S. 366); the enjoining of employee discharges pending an ad-

ministrative appeal to the Civil Service Commission is not authorized by the All Writs Act or the Administrative Procedure Act and is wholly inconsistent with the administrative scheme established to protect civil service employees.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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